SUBMITTED VIA ELECTRONIC MAIL
IN PDF FORMAT

C O M M E N T

TO: Brad C. Deutsch, Associate General Counsel, Federal Election Commission

FROM: Duncan Black, Markos Moulitsas Zúniga and Matt Stoller*

DATE: June 3, 2005

RE: *Notice of Proposed Rulemaking*: The Internet: Definitions of "Public Communication" and "Generic Campaign Activity" and Disclaimers

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The 2004 election cycle showed the revolutionary role which individual citizens can play in the election process through the Internet, from breaking important news stories to grassroots organizing to fundraising drives on behalf of candidates. As bloggers, we have devoted thousands of hours over the past few years as online advocates, reporters and fundraisers, and we are deeply concerned about the regulatory proposals currently before the Federal Election Commission.

We are troubled by much of what we see in the proposed regulations. As we understood Judge Kollar-Kotelly's opinion in Shays v. FEC, the concern was that the absence of regulations concerning coordinated expenditures on the Internet created a potential for "gross abuse", thus undermining Congressional intent in passing the BCRA. However, it appears to us that the FEC has taken that narrow concern and exploded it into a mandate to regulate all aspects of political activity on the Internet. The Notice of Proposed Rulemaking now makes possible everything from making group weblogs into regulated "political committees", to potentially imposing a "blogger code of ethics" with disclosure and disclaimer requirements enforceable by law (requirements otherwise unheard of for any other independent actor who deals with political campaigns), to intruding into the workplace to tell readers how much time they can spend participating in online political discussion groups.

We believe that Judge Kollar-Kotelly's order only requires the FEC to engage in rulemaking to prevent candidates and parties from improperly coordinating with outside groups regarding Internet communications, just as is the case in other media. The FEC should go no further. Until true harms are demonstrated, the FEC should allow the unique free market of ideas that is the Internet to regulate itself. No such harms manifested in the 2004 election cycle. Unlike every other medium which the FEC regulates, there is no mechanism by which entities can use wealth or organizational strength to crowd out or silence other speakers, thus negating a

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* We wish to thank all the users of our websites whose research and insights have contributed to this document. This was truly a collaborative effort, and we are grateful for and humbled by your support.

fundamental premise of many of the regulations proposed here.[1] Democracy is being fulfilled here, and this experiment should not be disrupted without due cause.

To the extent that the FEC is compelled to act in any other area regarding political activity on the Internet, we believe that two principles should guide the Commission: **equality and clarity**. By **equality**, we mean that individuals, PACs and candidates operating on the Internet should be treated no more harshly than they would be in any other medium. Indeed, the nature of the technology (low cost of entry, no scarcity of space due to unlimited bandwidth) is such that less regulation than other media will often be justified, but certainly never more.

By **clarity**, we insist that because of the low cost of entry and the ability of unsophisticated parties to easily enter the political sphere through the Internet, any regulations should make unmistakable any obligations or restrictions on ordinary citizen use of the media. These regulations should be invisible to the overwhelming number of amateur Internet bloggers and diarists, with impact only on those parties engaged in the kind of financial transactions such that they can reasonably be expected to be knowledgeable of the law. Even for those parties, these rules should be made clear in advance, so that there is no omnipresent worry about a citizen complaint being filed by partisans of the opposite side for acts not covered in these regulations.

Each of us is interested in to traveling to Washington D.C. to testify before the FEC regarding these matters. Please contact our attorney, Adam C. Bonin of Cozen O'Connor to discuss our testimony. He can be reached via email at abonin@cozen.com, via phone at 215.665.2051, or via traditional mail at 1900 Market Street, Philadelphia, PA 19103.

With these general thoughts in mind, we briefly state the background behind our interest in these matters before moving on to specific commentary on portions of the NPRM.

Interests Of The Parties

Duncan Black founded the weblog Eschaton (http://atrios.blogspot.com) in April 2002. The website covers politics, current events, economics and cultural issues. Posting under the pseudonym "Atrios", his website averaged 1-3 million viewings per month during the 2004 campaign. During the 2004 campaign, the website engaged in fundraising drives on behalf of a number of federal candidates, including Joe Hoeffel, John Kerry, Ginny Schrader, and Richard Morrison. The website allows anonymous and pseudonymous commenting by visitors as well. During the 2004 campaign and afterwards, Eschaton has accepted paid advertising from federal campaigns, charging fair market rates as determined via BlogAds.com.

Markos Moulitsas Zúniga started DailyKos (http://www.dailykos.com) three years ago. Focusing exclusively on Democratic and progressive politics, the website averages twelve

[1] As Justice Jackson recognized a half a century ago, "The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law unto itself…." Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Jackson, J., concurring). See also City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 496 (1974) ("Different communications media are treated differently for First Amendment purposes.") (Blackmun, J., concurring).

million visits per month. The website allows registered users to provide comments and post their own news stories pseudonymously. The website, which is a wholly owned part of Kos Media, LLC, raised a significant sum of money on behalf of its "Kos Dozen" list of candidates by directing readers towards preferred candidates' websites. During the 2004 Presidential campaign, Moulitsas served briefly as a paid consultant on technical issues to the Howard Dean campaign, a fact disclosed prominently on the website's main page. DailyKos has accepted paid advertising from federal campaigns and other vendors, charging fair market rates as determined via BlogAds.com. While Moulitsas is not currently consulting, he has reserved the right to work for federal campaigns while continuing his independent blogging.

Matt Stoller is one of several bloggers behind The Blogging of the President (http://www.bopnews.com), a website devoted to covering the national politics and the ways in which coverage has been affected by contemporary technology. Stoller has recently been hired by the Corzine for Governor campaign, leading to concerns regarding his ability to blog independently on federal candidates during his employment under the new regulations. During the 2004 campaign and afterwards, BOPnews has accepted paid advertising from federal campaigns, charging fair market rates as determined via BlogAds.com.

What We Do:

To help you understand why most regulation of political activity on the Internet would be misguided, it is first important that the Commission understand how individuals use the Internet at present for political activities. Among the activities we have participated in and observed are:

- Individuals posting **commentary regarding federal candidates and parties on their own websites** or ones operated by groups of like-minded individuals, either in their own names or under pseudonyms
- Individuals posting **comments and "diaries" regarding federal candidates and parties on websites owned by other individuals**, either in their own names, under pseudonyms or anonymously
- Individuals and groups **creating videos, advertisements and other audiovisual tools** both independently from and/or encouraged by candidates and parties to promote federal candidates and parties
- Individuals and groups **fundraising** on behalf of federal candidates and parties through pledge drives, where viewers are encouraged to visit the candidate or party website and directly contribute money
- Individuals **promoting or republishing candidate-authored materials**, or creating their own printable materials, on their own websites and on websites owned by others
- **Chats**, live discussions and threaded discussions between individuals and candidates (or their representatives)
- **Advertising** by candidates, parties and PACs on the above websites

- Individuals **providing links** from their own websites (or other people's websites) to any and all of the above, including websites controlled by federal candidates, parties and PACs
- Individuals **using email** to promote candidates, parties, PACs and other electioneering organizations.
- Individuals using email and websites, whether their own or those owned by other individuals or entities (such as Meetup.com), to **organize grassroots political activities** on behalf of federal candidates, parties and PACs.

All of this, mind you, is 2004-specific. No one knows what technologies will come of age and become widespread for the 2006 cycle, let alone 2020.

Anonymity, Futility, and the Problem of Enforcement

The architecture of the Internet is such that enforcement of regulations on all of the proposed areas might be quite difficult, even futile, and the FEC should be aware of the ways in which certain of its efforts might be evaded. Almost all of these proposed regulations have the potential to drive bloggers "underground" in order to avoid potential complaints. Unlike other media, the Internet allows for unprecedented levels of anonymity, in a way largely impossible to track down to an individual – especially not within the time it would take to rectify campaign abuses in any meaningful way.

Cost-free blogging tools allow anyone to blog in complete anonymity, as both Black and Moulitsas did when they first began. More sophisticated sites can be set up in overseas servers beyond the jurisdiction of U.S. law enforcement. Free email addresses can be set up via services such as Hotmail, Yahoo or Google to enable communication without surrendering one's identity or location. Nor need one's identity be revealed to have credence in this world: given that the blogosphere is a near-meritocracy, people's work is judged by the content of their writing and not their real-world characteristics. All three of us interact daily with fellow bloggers whose actual names, ages, occupations and locations are a complete mystery.

In an over-regulated environment, bloggers would be able to avoid legal headaches and expenses by either returning to (or remaining in) the realm of anonymity. The vast majority of bloggers have neither the legal expertise nor the resources to deal effectively with frivolous or partisan-motivated complaints to the FEC. Given the ease of maintaining one's identity a secret, the choice won't be a difficult one. This is especially going to be the case if any kind of FEC-related liability is attached to the postings by others on one's site, as it will be impossible for us to police every item posted.[2]

[2] DailyKos.com, for instance, hosts between 250-600 user-submitted diaries per day, generating anywhere from 4000-10,000 individual comments in response. In all, about 200,000 words are added to the site every day, only about 1000-2000 of them written by Moulitsas, or about 1% of the site's daily content.

Therefore, if a blogger plans on or fears of running afoul of the regulations – whether through nondisclosure of ties to campaigns or other means -- then there is no doubt that anonymity would provide the only technological shield needed to bypass the regulations.

As such, it will be those bloggers who post under their real names who will bear the brunt of the regulations, not those truly seeking to use the medium in nefarious ways. Given the highly charged partisan atmosphere we operate under, we have little doubt that – unless given full and clear protection from these regulations – we will someday be bombarded with multiple frivolous complaints in order to distract us from our work or outright shut us down.

In short, those who blog honestly will face the brunt of frivolous complaints, while those who seek to violate the rules can avoid any repercussions by remaining anonymous. The FEC must therefore focus its regulations on those entities which can actually be regulated – the sophisticated candidates, parties, PACs and other regulated entities which cannot hide underground.

Commentary on Proposed Regulations

From that background, we urge the Commission take the following actions:

Keep It Simple: As noted in the introduction, these regulations go much further than is necessary to comply with Judge Kollar-Kotelly's order. Her grievances stemmed from the absence of regulations regarding coordinated communications and did not reach into other substantive areas. Therefore, proposed regulations amending 11 CFR §§ 109.21 and 109.37 regarding coordinated communications are within the proper scope of the regulations, though we would further encourage the FEC to amend 11 CFR § 109.21(c) to exempt all dissemination, republication, etc., of campaign materials on the Internet generally.

We want to ensure that citizens who post comments or diaries on our sites have the freedom to include within their messages portions of or links to campaign materials, and believe that the regulations ought to make beyond peradventure their right to do so. Because the cost of republication on the Internet is essentially free, the FEC ought not be involved.

As such, even when paid campaign staffers visit independent websites to republish and provide links to official campaign materials, that behavior too should not be prohibited. Not only is such behavior cost-free, but it is likely impossible to police: Nearly all websites that allow comments and diaries permit them to be posted anonymously or pseudonymously. Even sites that require users to register cannot prevent campaign staffers from using non-official email addresses when doing so.[3] It would be impossible to bar or even track this innocuous activity, as already explained, so it is best not regulating it at all.

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[3] We have seen (or suspected) campaign staff members of doing both. Those that post under their own names attract additional attention and credibility, but they also create a risk that the campaign will be held responsible for any excesses within their posts. When staffers post anonymously, on the other hand, their posts carry none of the prestige or credibility that might otherwise flow from being official campaign outreach to the

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We recognize that the Commission has concerns regarding the use of corporate/labor facilities for political purposes, seeking to revise 11 C.F.R. § 114.9 accordingly to clarify that the prohibition on the use of corporate/labor facilities also extends to the Internet. However, the majority of our readers surf the Internet, participate on our websites and exchange email from work or at school (many universities are, of course, incorporated). So the proposed one-hour-per-week, four-hours-per-months regulations, if strictly enforced, would basically serve to limit adult participation in political activity on the Internet to the unemployed and self-employed (and unincorporated).

Let us suggest a different paradigm for work-related regulations: Corporations and labor organizations ought not coerce employees and members into participating in political activity while using company resources. Rules can properly prevent them from leveraging their power over employees and members into political influence. But voluntary Internet use should be left out of the scope of these rules.

Other Regulations

Beyond that, these regulations go much further than necessary. We believe that regulations on Internet-related political activities need to remain focused on the regulated candidates, parties and PACs spending money, and not on the media sources receiving it. We therefore have several critical suggestions as to how to best proceed. In all cases, the FEC's bias needs to be towards freedom of speech and promotion of lowercase-"d" democratic activity; that regulations should only constrict freedoms where clear harms have been demonstrated; and that, otherwise, the FEC should be acting instead to formalize the leveling of the playing field which the Internet has enacted and recognize the value of the new speakers empowered by technology.

The Media Exemption: We believe that it is vital that the FEC extend the media exemption from 11 C.F.R. §§ 100.73 and 100.132 to Internet-based news and commentary. Such regulations would cement the rights of bloggers to participate equally with large corporations in the discussion of electoral issues, and to be able to incorporate themselves as a liability shield and for other legitimate protective and financial purposes.

Through the Internet, private citizens perform the same vital role of disseminator and commentator as do television, print and radio news sources – indeed, more so, as the medium allows for anyone to participate at little or no cost, creating the first truly democratic mass medium in our history. Therefore, there is no reason not to extend the same exemption to citizens engaging in discourse on the Internet. Certainly, once the exemption is extended to the online arms of offline-based entities (such as CBSNews.com or WashingtonPost.com), it is only logical to include online-only media within the scope of the exemption. Indeed, the legislative history of FECA also supports a broad reading of the media exemption:

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grassroots, but it allows them to be freer in their discourse. Still, as noted elsewhere, they have to rely on the merits of their speech to be heard, nothing else.

> [I]t is not the intent of the Congress in the present legislation to limit or burden *in any way* the first amendment freedoms of the press and of association. Thus [the media exemption] assures the *unfettered* right of the newspapers, TV networks, and other media to cover and comment on political campaigns.

H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 4 (1974) (emphasis added).

We also believe that under the plain meaning of 2 U.S.C. § 431(9)(B)(i), bloggers already qualify as "periodical publications." These are websites which are regularly updated with new information, and nothing about the term "periodical" has previously required some fixed interval between publications. Furthermore, analytically, it makes sense to look at bloggers for what they are not – media entities "owned or controlled" by candidates, parties or PACs – even though, like other journalists, they may have contact with campaign staff members in order to obtain "scoops" as to what a campaign is doing. But when they are not controlled by regulated entities, bloggers are entitled to the same presumption of legitimacy and integrity.[4]

At their best, bloggers are true journalists, contacting sources, researching facts and raising public awareness of vital issues. Even at their "worst," bloggers perform the same function as talk radio hosts or opinion journalists in the print and televised media, energizing partisan supporters through humor, vitriol and innuendo. That which is allowed under the media exemption in other formats (TV, radio, print) should be equally permitted on the Internet. There is no legitimate reason to distinguish between Sean Hannity, Maureen Dowd, Bill O'Reilly and us in terms of who among us can freely speak in support of or opposition to federal candidates without incurring federal reporting obligations or contribution limits. The advocacy that bloggers engage in is certainly within the contours of the "legitimate press function" as defined by Reader's Digest Ass'n, Inc. v. FEC, 509 F. Supp. 1210 (S.D.N.Y. 1981) and FEC v. Phillips Publishing, Inc., 517 F. Supp. 1308 (D.D.C. 1981).[5]

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[4] Certainly, the revelations during the past year of "independent" journalists and opinion writers being paid by the current presidential administration should put to rest any notion that advocates in one medium are presumptively any more or less objective than those in any others.

[5] The "legitimate press function" test operates to prevent the government from investigating and harassing providers of news and commentary, while preventing corporations, labor organizations and political parties from injecting their influence into politics under a journalistic guise.

The activity of online bloggers clearly falls within the contours of the legitimate press function, which includes measures taken in furtherance of the business of selling news or commentary. Phillips Publishing, 517 F. Supp. at 1313. Unlike the disputed activity in Readers Digest and Phillips Publishing, these blogs almost exclusively traffic in online commentary, purely journalistic in nature. The typical business activities of a blog -- displaying paid campaign advertising for example -- are clearly related to its core business functions. Just as Phillips Publishing acted in its press function by soliciting potential subscribers who would purchase its content, 517 F. Supp. at 1313, a blog is acting within its legitimate press function by accepting advertisements that are of interest to its readers. Without advertisers' money, bloggers like us would be unable to devote themselves full time to their websites.

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However the media exemption is ultimately structured, clarity is crucial. We fear the passage of vague regulations creating a multifactor test determining who is eligible for the media exemption, leading to a Massachusetts Citizens for Life-type situation in which complex tests are employed to determine whether an entity qualifies and uncertainty sets in.[6] Given the number of legally unsophisticated parties engaging in political speech activities on the Internet, it is vital that bloggers and commenters are given unmistakable assurance of their right to speak freely and comment on the news of the day. All of them. Left, right, large, small, Democratic, Republican, centrist (do they exist?), if an individual wants to run or participate in a website to become engaged in the political process, she should know that it is her unfettered right to do so.

We also recognize the concern, as expressed via the comments being submitted by the Institute for Politics, Democracy and the Internet and others, that to expand the media exemption to include bloggers would diminish "the privileged status the press currently enjoys." Curiously referring to bloggers' desire to equal treatment as "demands", the IPDI portends that such an expansion would destroy campaign finance regulations and/or reporter shield laws.

Such claims are either legally irrelevant or factually invalid, and often both. Neither the First Amendment nor our federal campaign finance laws exist in order to entrench a regime in which only an elite class of speakers possessed rights to speak out on political affairs (and be paid for doing so).[7] The duties of the Federal Election Commission, according to its own website, "are to disclose campaign finance information, to enforce the provisions of the law such as the limits and prohibitions on contributions, and to oversee the public funding of Presidential elections." [8] The FEC does not exist to ensure that a particular type "privileged status" is given only to one preferred group of "serious" media members. Indeed, the FEC has long extended the media exemption beyond a selected caste of the j-school anointed to include such entities as MTV,[9] and even the National Rifle Association was allowed to broadcast "NRAnews" in 2004 without being deemed to fall outside the restriction.

Moreover, as explained throughout this document, we can no longer pretend that journalists and pundits currently operating under the media exemption are never themselves

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Nor are blogs susceptible to being utilized as a cover for disallowed expenditures as was the special edition "election newsletter" in MCFL. Blogs do not substantially change in form, even during the furor of a national political campaign.

[6] One must wonder: if the MCFL exception applies to the National Rifle Association, FEC v. National Rifle Association, 254 F.3d 173 (D.C. Cir. 2001), does it also apply to Kos Media, LLC, assuming that Kos Media's revenues are solely from advertising from regulated political entities and not from corporations?

[7] Paraphrasing Justice Holmes' famous dissent in Lochner v. New York, the 1st Amendment did not enact Ms. Katharine Graham's social circle.

[8] http://www.fec.gov/info/mssion.shtml

[9] FEC Advisory Opinion 2004-7.

activists – have the IPDI leaders listened to talk radio during the past decade-plus? Did they miss every single one of Paul Begala and James Carville's appearances as hosts on CNN's "Crossfire" during the 2004 campaign while they were simultaneously functioning as consultants to the Kerry for President campaign? [10] Have they not consulted the public records compiled at websites like OpenSecrets.org, which detail the massive personal campaign contributions made by the owners,[11] editors and journalists[12] of these sacrosanct media corporations?

It would be profoundly ironic for the interests of established media organizations, which so gleefully reported on the rise of the blogosphere and its role in democratizing politics, to themselves contribute to building an iron wall between themselves and bloggers. The Internet did not only open up politics to citizen participation in the way the Framers intended; it did so to the news media as well, returning to the days when individual pamphleteers like Thomas Paine could rally a nation. Nothing in the First Amendment, campaign finance law or the FEC's interpretation thereof suggests that the Freedom of the Press be limited to those who write without expressing opinion or passion.

Finally, because of the low costs of entry and infinite bandwidth in the Internet speech "market," the FEC can abandon within this sphere any restrictions employed in other media meant to combat excessive partisanship. Requirements on other media like giving "reasonably equal coverage" to all candidates or that equal rates be extended to all advertisers have no place in a medium defined by the infinite space it provides to all speakers. Such regulations only make sense with regards to television and radio, where market entry is costly and the avenues for expression limited.

Advertising and Control: Clearly, to avoid the regulations regarding coordinated communications, it is important that the FEC carefully define when a website is "owned or controlled" by a candidate/party/etc. All three of us, as well as countless other bloggers, have accepted and hope to continue to accept paid advertising from federal campaigns. Generally, this

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[10] This blind spot is especially odd given that "Crossfire" is broadcast from the very building at George Washington University in which the IPDI has its offices – the Media and Public Affairs Building, 805 21st St., NW, Washington, DC 20006. *See also* Howard Kurtz, "The Kitchen Sink Campaign," Washington Post online edition (9/13/04), available online at http://www.washingtonpost.com/wp-dyn/articles/A17738-2004Sep13.html .

[11] E.g., Michael Eisner, head of Disney/ABC News: $46,500 in federal contributions during the 2004 cycle; Rupert Murdoch, head of News Corp/Fox News and other media entities, $61,004 in federal contributions since 2001.

[12] One example should suffice: Katrina vanden Heuvel, editor of The Nation, has given $194,000 to federal candidates, PACs and party organizations over the years, Surely, she still is a journalist worthy of the media exemption, no? *See, generally* Howard Kurtz, "Journalists Not Loath to Donate To Politicians", Washington Post A-1 (1/18/04), available online at http://www.washingtonpost.com/ac2/wp-dyn/A26386-2004Jan17?language=printer. ("More than 100 journalists and executives at major media companies, from NBC's top executive to a Fox News anchor to reporters or editors for the Washington Post, Wall Street Journal, New York Times, USA Today, CBS and ABC, have made political contributions in recent years."). See also http://www.newsmeat.com/, or just go to http://opensecrets.org/indivs/index.asp and type in "journalist" under occupation.

advertising comes through a third-party intermediary like Google AdWords or BlogAds, and we do not deal with the campaigns directly.

We therefore urge the FEC to import its strict definition of "control" from 11 C.F.R. § 100.5(g)(4) into this realm: Where the candidate in question lacks the power to hire and fire website employees, does not control a significant percentage of the website's budget or otherwise control its activities, the independence and legitimacy of the website *must* be assumed by the law and protected under these regulations. Merely accepting advertising from campaigns does not mean that a weblog is any less independent in its editorial content, just as a newspaper's endorsements are not presumed to flow from whichever campaign advertised in it more heavily.

Corporate Form: Similarly, we seek protective regulation from the FEC to ensure that bloggers can avail themselves of the benefits of incorporation without falling into the 2 U.S.C. § 441b restrictions. It should not matter whether a website is organized by a corporation or a legal partnership or an unincorporated individual. Obviously, the FEC has run into similar issues with NRA News and the Wal-Mart/Elizabeth Dole magazine (MUR 5315) and there is a danger of corporations using the media exemption to avoid 2 U.S.C. § 441b. However, based on those examples, that risk is no greater online than it is offline. So long as the Washington Post Co.-owned Slate.com retains the exemption online, so too should Kos Media LLC-owned DailyKos.com. The FEC can deal with abuses of this exemption without denying it to those who have legitimate reasons for assuming the corporate form.

Payment to Bloggers: It should make no difference to the FEC in granting the protections of the media exemption, whether a blogger is compensated for editorial content or advertising revenues. Merely receiving payments for legitimate services from a campaign is not sufficient indicia of ownership or control.

Part of the FEC's analysis here needs to be grounded in an understanding of the way the blogosphere works. Credibility is earned over time. Some, like Andrew Sullivan or Joshua Marshall, transfer some of it through preexisting experience in print journalism, but for most bloggers, like the three of us, it has been built exclusively on the value of the news and editorial content we provide. No campaign would pay any blogger a dime if his or her website had not already developed a reliable readership based on the quality of the information provided.

Once protected under the media exemption, we believe that bloggers who receive occasional payments from campaigns would be free from the legal morass predicted by commentator Bob Bauer:

> Assume that a blogger decides, for whatever reason, to accept payment from a candidate to cover her campaign, or positions on issues, intensely, for an agreed period. Later the blogger devotes similar attention to another campaign, but this time, for reasons of friendship, passion, or reconsidered editorial policy, there is no charge. There is every reason to believe that the blogger has opened himself to a complaint that he has made an "in kind" contribution to the second candidate. 11 C.F.R. §§ 100.111(a), (e)(1). Under the relevant rules, the space provided is something of "value," an "in-kind" contribution," and the value

> would be the difference between what is charged to the first candidate and the amount charged—nothing—to the second. 11 C.F.R. §§ 100.111(e)(1)-(e)(2). If the blogger is incorporated, this contribution is illegal; and even if he is not, the contribution has to be accounted for in other ways. [13]

Providing an expansive media exemption to bloggers should eliminate that catastrophic result: None of our speech would be regarded as a "contribution", and the in-kind rules would not apply. It might also obviate the dire consequences forecast by the Online Coalition members and others in their submissions – by placing group blogs (even incorporated ones) under the media exemption, their expenditures on behalf of their website or personal contributions to candidates outside of the blog would not be used to force them to file as a formal political action committee. [We hope.]

We recognize that the FEC might feel some skittishness about allowing bloggers to be paid while simultaneously being treated as "media." This fear may stem from an assumption that bloggers are more likely to be swayed by money and become a *de facto* controlled entity. We do not believe this to be the case, primarily because of every blogger's need to maintain credibility given the diversity of competing options available of the blogosphere. In short, the free market of ideas works here: With zero cost of entry for participants (Blogger.com, the most popular blog service, is free) and zero cost for readers, citizens have unlimited options in terms of who to read and *who to trust*. Moreover, without the ability to receive paid advertising for our advocacy from those entities most desiring to reach our readers, we would no longer be able to sustain ourselves as independent voices and practice the kind of around-the-clock journalism that the Internet enables.

Instead, the "control" test under 11 CFR §109.21(d) is sufficient for these purposes: If a campaign does not have day-to-day control of a website's contents, it is an independent website worthy of the media exemption. However, if a website is constantly fed inside information by a campaign, receives the bulk of its operating revenues from that campaign and exists for no other purpose other than promote that campaign's interests and is in effect a <u>de facto</u> agent of the campaign, *then and only then* might the exemption be inappropriate.[14] Even so, it begs the question: *What is the harm that you are seeking to prevent?*

Whether other such payments should be disclosed is discussed later.

Fundraising By Weblogs: The NPRM does not address whether a website can engage in fundraising on behalf of candidates while maintaining the media exemption. We urge the FEC to make clear that websites can do so while retaining the exemption, and without falling under any regulations that do not apply to others who independently solicit money on behalf of campaigns.

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[13] Bob Bauer, "Harmless Surgery and Internet Politics" (4/15/05), available on the Internet at http://www.moresoftmoneyhardlaw.com/articles/20050415.cfm.

[14] Clearly, disclaimer requirements should attach to websites which are <u>actually</u> owned and controlled by candidates, parties and PACs. Jane Doe for U.S. Senate should not be able to create and operate Jane's-Opponent-Stinks.com without revealing the site's ownership.

The FEC has already ruled on this issue in Advisory Opinion 1980-109, which explicitly addressed the question as to whether a publication otherwise meriting the media exemption could engage in fundraising and advocacy on behalf of a federal candidate. The question there was whether The Ruff Times, a financial advisory newsletter, could endorse federal candidates and encourage its subscribers to support them financially. There, the FEC determined that so long as the publication did not act as a conduit or intermediary for the funds – in other words, the funds passed directly from the donor to the campaign – then the publication would remain covered by the exemption and the fundraising solicitation would not result in a contribution from the publication to the campaign.[15]

We believe that this holding was correct, and that these regulations must make it explicitly applicable to the Internet and other media. Surely, no one in the FEC raised an eyebrow when on December 5, 2003, syndicated columnist Charles Krauthammer wrote in his Washington Post column (and elsewhere) encouraging readers to send donations "not exceed $2,000 ($4,000 for a married couple)" to the Republican National Committee in order to oppose Gov. Howard Dean's presidential bid.[16]

Two of us (Duncan, Markos) engaged in significant fundraising during the 2004 election cycle, posting links and graphics to encourage our readers to contribute to candidates we favored. At all times, we directed people either to the campaign's (or party's) own website, or to ActBlue.com, a federal PAC lawfully aggregating pass-through online donations. At no time did we touch the money ourselves or receive any commission from the campaigns for doing so.[17] As the 2006 federal elections draw near, we would prefer clarity as soon as possible so that we understand what behavior is permitted under the exemption, and without having to request an Advisory Opinion the day after these regulations are issued.

Disclosure Of Payments To Bloggers: This is a section of the NPRM which has attracted much attention from our readers, understandably, given the recent controversies over payments made to bloggers by the John Thune for Senate campaign for blogging activities and to Markos Moulitsas and Jerome Armstrong by the Dean for America campaign for consulting services.

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[15] See, similarly, the Statement of Additional Reasons filed by Commissioner Mason in In the Matter of Robert K. Dornan, et al., MUR 4689 (2000) ("The media exemption would clearly allow a broadcaster to air a Dornan campaign rally replete with express advocacy, to bracket the broadcast with favorable commentary, to follow it with an editorial endorsing Dornan, and to cap it off with an appeal for listeners to contribute funds to Dornan. *See, e.g.*, AO 1980-109. Thus, the relationship of a broadcast to a campaign (e.g. whether it includes express advocacy or constitutes an endorsement) can have no bearing on whether the media exemption applies.")

[16] Charles Krauthammer, "The Delusional Dean", Washington Post A-31 (12/5/03), available on the Internet at http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&contentId=A37125-2003Dec4&notFound=true.

[17] At most, there was communication with certain campaigns in order to develop a system for "tagging" receipts from our websites, so that we could publicize the total amount raised from our sites for the candidates during "pledge drive" periods. We similarly request clarification from the Commission that such behavior does not constitute undue coordination.

We believe that the FEC **should not** generally require bloggers to disclose payments from candidates, and that bloggers should instead be treated the same as any other vendor paid by candidates for legitimate services rendered, whether in terms of separate advertising or the provision of editorial content. Here's why:

First, we note again that such regulations would run far afield of Judge Kollar-Kotelly's mandate. The FEC has not been asked to act in this field, so until some harm is demonstrated, **please don't**.

Beyond that, we return to the principle of parallelism. Unless circumstances dictate otherwise, the Internet should be regulated no more stringently than any other medium. The fact is that all payments to bloggers are already disclosed on the "other end" of the transaction, as part of a campaign's disbursement filings, just as payments to any other vendors.[18]

Ethical bloggers already engage in voluntary disclosure. Markos disclosed his consulting relationship with the Dean campaign on the front page of his website throughout his contract while Jerome ceased blogging during his consultancy, and even one of the controversial Thune-financed bloggers acknowledged he was a paid consultant in an interview with the Sioux Falls Argus Leader in August 2004.[19] Bloggers have done so and will continue to do so voluntarily because, as stated above, credibility is their most crucial currency, and a blogger later found to have concealed such relationships will soon find himself without any readers. The free market of ideas can govern; the FEC need not.

On a factual level, it is worth noting to the Commission that most payments to bloggers come through paid advertising, not paid editorial content. Such advertising by its nature discloses its source, and there is no need to double the disclosure requirements by forcing private citizens to reveal what the campaign has done already.

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[18] Unfortunately, payments by Senate candidates are not filed electronically and are extremely difficult to parse through. Citizens who wanted to determine whether the Thune bloggers were being paid were required to read through a 3500+ page PDF document that was completely un-searchable in order to locate the entries indicating payment to the bloggers in question for "research consulting" work. It is our understanding that primary responsibility lies with the Senate Rules Committee, and not the FEC, to require electronic filing, and we strongly encourage it to do so.

Moreover, the technology that exists would certainly allow campaigns to easily file all disbursement reports within 72 hours of all disbursements made that relate to media expenditures. Such disclosure, especially in the final two months of a campaign (similar to the 48-hour rule for late contributions), would do a great service in benefiting the public's understanding of how a campaign is behaving in the public sphere.

[19] Jennifer Sanderson, "Blogging: A venue to rant, rave and review," Sioux Falls Argus-Leader (8/9/04), available on the Internet at http://www.southdakotaelections.com/Story.cfm?Type=Election&ID=2713. ("Blogs run by campaigns often are seen as less pure, so some candidates buy space on independent pages. There can be other ties, too. Lauck dissects 'Daschle v. Thune' on his blog without mentioning he's a paid consultant for Thune's campaign.")

It is our understanding that requiring the recipient of a disbursement from a campaign to make his own disclosure of the payment is absolutely unprecedented under campaign finance law. In all circumstances that we have researched, that duty lies with the federally regulated entity and not private citizens. Indeed, when we look at other media entities, there is no similar duty imposed by law:

- on a cable news show, for the host or guest to disclose all of the campaigns for which s/he is presently working;
- on talk radio, for callers or guests to disclose whether they have been paid by a campaign to call in and spout talking points; or
- in print, for writers of op-ed columns or letters to the editor to disclose when they have been paid by a campaign.

To be sure, such information about paid speech across all media would be of interest to some citizens. That, however, cannot be the end of the inquiry, because the same is true of many other campaign expenditures or contributions which are only disclosed on a quarterly basis, both with regards to the media and otherwise. There is no substantive reason why the Internet should be singled out for intrusive, compulsory disclosure requirements when parallel, more legally sophisticated outlets for expression are not, especially when there is no legal mandate that it regulate this area at all. While it would do wonders for the consultant/pundit class to have to disclose all their conflicts of interest every time they appeared in print or on radio or on TV, such disclosure is mandated by one's ethics, not the law, and no special legal obligation should be placed on speakers in this sphere which is not applicable to all media.[20]

Furthermore, there should be no disclosure requirement for non-speech activities provided to campaigns by bloggers-as-vendors. As we have seen, bloggers can be paid by campaigns for non-blogging activities as well. As was widely (and often inaccurately) reported, Mr. Moulitsas was paid by the Dean for America presidential campaign for technical consulting services regarding their web-based activities, not for speech. Such payments were fully disclosed as part of the campaign's standard disbursement practices and, based on his personal sense of his ethical obligations, by Mr. Moulitsas on the front page of his website throughout the duration of his consultancy. These regulations need not require anything in this realm.

We also would like to flag the issue of campaign staffers blogging in their spare time about other federal candidates. Mr. Stoller, as noted above, is a paid staffer for a state campaign (Corzine for Governor). So long as he writes on his own time, without abusing campaign resources, without coordinating with the federal campaigns on which he reports or opines (under

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[20] Just this week, Los Angeles Times national political columnist Ronald Brownstein disclosed that his wife had taken a position on the staff of Sen. John McCain, whom Brownstein covers on a regular basis. Ronald Brownstein, "On Filibuster and Stem Cells, GOP Bears Pain of Compromise," Los Angeles Times A16 (5/30/05). We mention this merely to suggest that if the FEC is truly concerned with ferreting out potentially corruptive conflicts-of-interest, looking at money alone may not be enough. Does the FEC really want to investigate with whom bloggers share their beds?

the definition previously established by law), we do not see the harm in such behavior, nor when staffers for federal candidates do the same.

This brings us to the issue of paid editorial content. When a campaign pays a blogger for the explicit purpose of publishing favorable stories, this arguably constitutes "announcements placed for a fee" under the revised 11 C.F.R. § 100.26 and therefore constitute public communications subject to disclosure rules – that is, disclosure by the campaign, not the website, though we would argue that if the blogger (and not the campaign) drafts the posts, then it might be insufficiently coordinated to require immediate disclosure. But why stop there? When a presidential hopeful wines and dines a print journalist on a New Hampshire campaign bus with the understanding that favorable coverage will ensue from such exclusive access, the current campaign finance laws do not require said journalist to disclose such largess when said story is printed, though ethical requirements of the profession might. The same should hold here.

Again, technology can fix what the law need not. Quick, electronic filing and disclosure of all media-related disbursements can provide the information the public needs without forcing unprecedented obligations upon private citizens. More importantly, in the absence of any demonstrated harm, there is no need for the FEC to move forward at all in this realm.

Paid Advertising: We want to highlight for the FEC one additional enforcement difficulty in requiring disclaimers on paid internet advertising. Google AdWords – the largest advertising mechanism on the Internet – limits its advertisements to twenty characters or less (before linking the reader to the designated site). It would be impossible for such advertisements to contain a disclosure while also functioning as advertising within such technological limits. Therefore, it makes more sense to require for online advertisements that the source of the funding be displayed within the advertisement *or* on the site to which the advertisement is linking readers.

Volunteer Activity: As noted above, we believe that individuals acting independently or as volunteers posting blogs or other content should be entitled to the exception just as if the content were posted on their own websites. Voluntary grassroots activity should result in no filing or disclosure requirements. Even when done in cooperation, consultation, or concert with a candidate or a political party committee, no contribution or expenditure should result and neither the candidate nor the political party committee should incur any reporting responsibilities. This is democracy at its best, and the Commission should encourage such behavior.

CONCLUSION

The Federal Election Commission should proceed cautiously in this area, and follow its original instincts as expressed in its 2002 rulemaking: Except when there is a demonstrated potential for corruption, steer clear of regulation of political activity on the Internet. Unfortunately, these proposed regulations go far afield of what is necessary to comply with the Court's order, and well beyond any demonstrated need based on the 2004 election cycle.

The most important thing the FEC can do with regard to the Internet is to generally leave it alone, to allow it to serve as a vibrant counterweight to other media in which most individuals have no ability to speak to the masses and cannot influence the debate. As Judge Stewart Dalzell observed in ACLU v. Reno, 929 F. Supp 824 (E.D. Pa. 1996), no medium better fulfills the promise of the First Amendment than the Internet in reclaiming for ordinary Americans from wealthy interests the power to participate in and influence the national debate:

> It is no exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country -- and indeed the world -- has yet seen. The plaintiffs in these actions correctly describe the "democratizing" effects of Internet communication: individual citizens of limited means can speak to a worldwide audience on issues of concern to them. Federalists and Anti-Federalists may debate the structure of their government nightly, but these debates occur in newsgroups or chat rooms rather than in pamphlets. . . .
>
> [I]f the goal of our First Amendment jurisprudence is the "individual dignity and choice" that arises from "putting the decision as to what views shall be voiced largely into the hands of each of us", then we should be especially vigilant in preventing content-based regulation of a medium that every minute allows individual citizens actually to make those decisions. Any content-based regulation of the Internet, no matter how benign the purpose, could burn the global village to roast the pig.[21]

Let us suggest a second metaphor. A neighbor has come to visit your house, and notices that there's a draft coming through the window, leaking in some unpleasant cold air. You call your handyman over to the house, and he presents you with two options: close and repair the window frame, or bulldoze the house and start from scratch – because, as the handyman explains, there are bound to be other problems with the house in the future.

We think this house is in pretty good shape, and we'd like to keep it pretty much the way it is. Thank you for your consideration, and we look forward to testifying before the Commission.

/s/
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[21] 929 F. Supp 824, 882 (E.D. Pa. 1996) (citations omitted).